BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Circuit Court of Appeals may be summarized as follows:

(1) Where a statute (Sec. 8865, G. C.) requires a municipality to give notice of its resolution to abolish a grade crossing to the "owners of property," in order to afford the latter an opportunity to file claims for damages, and the municipality does give such notice to an owner and pays him damages for injury to his property as determined by a judgment of court, the payment of such damages to the owner, instead of to a mortgagee who knowing of the proceedings asserted no claim, constitutes negligence on the part of the municipality in the handling and application of its funds; and where the railroad has contributed its statutory share towards the damages paid to the owner, the municipality has no further claim against the railroad with respect to any additional damages the City may be required to pay the mortgagee for impairment of his security, notwithstanding provisions in the statute and the grade elimination decree that the "cost of the construction and **all damages arising therefrom**" shall be borne 65% by the railroad and 35% by the City.

(2) The jurisdiction of the Bankruptcy Court to pass upon the validity of claims extends to claims where the liability is a moot question and contingent upon the determination of an action pending in the State Court; and where a City, sued in the State Court for impairment of mortgage security resulting from a grade crossing elimination, files a claim in the reorganization of the railroad for the latter's share of such damages, the Master may in such case totally disallow the claim and adjudicate against it as a matter of law, before the liability of the City to the mortgagee had been determined in the State Court action.

The court did not specifically pass upon the question involving the construction of the statute, although urged

in the brief, whether Sec. 8883, G. C.—giving a municipality a right of action against a railroad to the extent of 65% of the *"cost of constructing the improvement,* including crossings or viaducts and the raising or lowering of the grades, together with the *cost of land or property purchased or appropriated, and damages to owners of abutting property, or other property"*—extends, by virtue of those provisions, to damages that a municipality is required to pay to a mortgagee in addition to the damages paid to the owner; whether "cost of improvement" and "all damages arising therefrom," within the meaning of the grade elimination decree, include such additional damages.

I. There was no evidence of negligence or misapplication of funds on the part of the City as will relieve the Railroad from contributing its statutory proportion towards the damages the City may be required to pay for impairment of mortgage security in addition to the damages paid to the owner.

The court's decision is based on the assumption that the City was negligent in making the disbursements and to see to their proper application. May we again urge that there was no evidence of such negligence or misapplication, and the record contains none.

Sec. 8864, G. C., provides that when deemed necessary by a municipality to join with any railroad company in the alteration or abolition of a grade or other crossing, the council of the municipality, by resolution, shall declare such necessity and intent, the manner and method of constructing the new crossing, the land or other property necessary to appropriate, and how the cost is to be apportioned between the municipality and the railroad company.

The grade elimination decree, authorizing the construction of the overhead bridge and entered pursuant to Section 8883, G. C., contained this provision:

"The actual cost of the construction of said improvement and *all damages arising therefrom* shall be borne 65% by the Erie Railroad Company and 35% by the City of Youngstown."

The other sections of the Ohio General Code applicable are:

Sec. 8865. Such resolution shall be published and *notice of its passage given to owners of property* abutting on the proposed improvement, in the manner provided as to resolutions of a city council declaring the necessity of a contemplated public improvement, and claims for damages thereby caused, must be filed in the manner, and within the time prescribed in such cases.

Sec. 8883 (*prior to its amendment in 1939*). The cost of constructing the improvement authorized, including the making of ways, crossings, or viaducts, above or below the railroad tracks, and the raising or lowering of the grades of the railroad tracks and side tracks, for such distance as may be required by such municipality and made necessary by such improvement, *together with the cost of land or property purchased or appropriated, and damages to owners of abutting property, or other property,* shall be borne 35% by the municipality and 65% by such railroad company or companies. *The municipality shall have a right of action against any such railroad company* for the recovery of 65% and such costs payable by it, with interest from the time they become due.

Sec. 3823. An owner of a lot, or of land, bounding and abutting upon a proposed improvement, claiming that he will sustain damage by reason of the improvement, within two weeks after the service of the notice or the completion of the publication thereof, shall file a claim in writing with the clerk of the council, setting forth the amount of the damages claimed, with a general description of the property with respect to which it is claimed the injury will accrue. An owner, who fails to do so, shall be deemed to have waived such damages and shall be barred from filing a claim or recovering damages.

> Sec. 3830. No person who claims damages, arising from any cause, shall commence a suit therefor against the corporation until he files a claim for such damages with the clerk of the corporation, and sixty days elapse thereafter, to enable the corporation to take such steps as it deems proper to settle or adjust the claim, but this provision shall not apply to an application for an injunction, or other proceedings to which it may be necessary for such applicant to resort in case of urgent necessity.

The City has complied with every legal requirement in handling that claim. It gave notice to the owner as required by statute and resolution and paid the money to the owner under judgment of court and with knowledge and consent of the mortgagee. It was obliged to go no further. The State Court of Appeals in the recent case of *Union Land Bank v. Hurford* (1935), 53 O. App. 116, specifically held that a mortgagee is not an "owner" entitled to statutory notice. Where, then, is the negligence or misapplication of funds on the part of the City? The case of *Brown v. Toledo,* 130 O. S. 513, giving a mortgagee a right of action for impairment of mortgage security, was not decided until 1936, some eight years after settlement of the claim with the owner. But in that case both the railroad and the city paid double under the same statute, once to the owner and later to the non-resident mortgagee. The railroad, represented by eminent counsel, did not deem the issue of joint liability controversial.

The only aura of the City's negligence was the hint, the hypothetical "if," contained in the opinion of the state Court of Appeals in the foreclosure case (Record, p. 49), "If it misapplied the funds the City only was liable." But that dictum was mere *obiter* and not a determination or decision which could serve as a precedent for this Court to follow. The question of the railroad's liability to the City was not an issue in that case.

The Bank's belated action for impairment of security, predicated upon the theory of absence of notice to it, as mortgagee, came to it as an afterthought with the advent of *Brown v. Toledo,* 130 O. S. 513, decided in 1936 and involving a non-resident mortgagee.

As to whether a mortgagee is an "owner" entitled to notice and required to be joined as a necessary party to the appropriation proceedings, there is a conflict in the Ohio decisions. In *Harrison v. Sabina* (1885), 1 O. C. C. 49 and *Big Four Bldg. Co. v. Cincinnati* (1901, Cincinnati Superior Court), 12 O. D. 218, it was held that the word "owner" includes a mortgagee, while a contrary view was expressed by the Court of Appeals in *Put-in-Bay v. Stimmel* (1896), 18 O. C. C. 644, 7 O. D. 380, and in the more recent case of *Union Land Bank v. Hurford* (1935), 53 O. App. 116, wherein it was specifically held that a mortgagee is not an owner entitled to statutory notice. The question was not passed on in the case of *Brown v. Toledo,* 130 O. S. 513. Thus we have a unanimous opinion of our own Court of Appeals in the *Hurford* case, that a mortgagee is not an owner for the purpose of statutory notice. There is also eminent authority in other jurisdictions supporting that view. The mortgagee is left to his legal remedy against the mortgagor, or he may go to a court of equity, follow the award, and have it applied to his mortgage debt: *Norvich v. Hubbard,* 22 Conn. 587; *Whiting v. New Haven,* 45 Conn. 303; *Schemerhorn v. Peek,* 43 Kan. 667, 23 Pac. 1043; *Goodrich v. Atchison County,* 47 Kan. 355, 27 Pac. 1006; *Rand v. Fort Scott Ry.,* 50 Kan. 114, 31 Pac. 683; *Chicago Ry. v. Sheldon,* 53 Kan. 169, 35 Pac. 1105; *Breed v. Eastern Ry.* (Mass.) 5 Gray, 470; *Meacham v. Fitchburg Ry.* (Mass.) 4 Cush. 291; *Wood v. Westborough,* 140 Mass. 403, 5 N. E. 613; *Farnsworth v. Boston,* 126 Mass. 1; *Read v. Cambridge,* 126 Mass. 247; *Providence Co. v. Fall River,* 187 Mass. 45, 72 N. E. 338; *Bates v. Boston Ry.,* 187 Mass. 428, 72 N. E. 1017; *Parish v. Gilmanton,* 11 N. H. 293; *Gurnsey v. Edwards,* 26 N. H. 224.

Except for partial interference with access to and from the building, the City has taken no physical portion, not an inch, of the property affected by the mortgage. *Lewis on Eminent Domain,* Vol. 2, Sec. 523, says:

> "The question whether mortgagees are necessary parties to condemnation proceedings, the authorities are not only conflicting but very unsatisfactory. The cases go almost entirely upon language of the statutes as though it was a matter entirely within the control of the legislature."

He then proceeds to distinguish between the taking of land proper covered by mortgage and the taking of a mere right of way which is of "slight consequence."

II. The Railroad is liable for statutory contribution towards damages for impairment of mortgage security in addition to the damages paid to the owner, by virtue of the provisions contained in the statute and grade elimination decree.

We contend that the railroad is liable, by virtue of statute and the grade elimination decree, for its proportionate share of the damages the City will be required to pay to the Bank for impairment of its mortgage security, or better still, for the easement of egress and ingress the City acquired under the consent decree. It is all part of the "cost of the improvement" and "damages arising therefrom," the liability for which the railroad cannot by any stretch of imagination escape. It is a joint liability of the City and the railroad: *Schimelman v. Lake Shore R. R.,* 83 O. S. 356; 34 *O. Jur.,* p. 630, Sec. 856.

The weight of authority is to the effect that the *entire cost of the elimination* or separation of a railroad crossing on a highway or street may, consistently with due process of law, be imposed upon the railway company by the state or duly authorized municipality acting under state authority. The cost or expense of constructing

bridges or viaducts, made necessary by the action of the municipality, may likewise be cast upon the railway company; and bankruptcy or insolvency of the railway company is no excuse: *Erie R. R. v. Utilities Comrs.*, 254 U. S. 394, 65 L. Ed. 322; *Wheeler v. Railroad*, 178 U. S. 321 at 324; *Cincinnati Ry. v. Connersville*, 218 U. S. 336, 54 L. Ed. 1060; *Missouri Pacific Ry. v. Omaha*, 235 U. S. 121, 59 L. Ed. 157; *New York Ry. v. Bristol*, 151 U. S. 556, 38 L. Ed. 269; *Missouri-Kansas Ry. v. Oklahoma*, 271 U. S. 303, 70 L. Ed. 957; 44 *Am. Jur.*, p. 534, Sec. 311; *Elliott on Railroads*, Vol. 2, p. 558, Sec. 975; Annot. 55 *A. L. R.* 660; 62 *A. L. R.* 815; *Chicago Ry. v. Commerce Com'n*, 326 Ill. 625, 158 N. E. 376, 55 A. L. R. 654; *New York R. R. Appeal*, 58 Conn. 532, 20 At. 17.

The cost of constructing the sidewalks, pavements, sewers and guard rails, and relocating existing sewer and water mains, and the *cost incidental to the acquisition of additional land or resulting from consequential damages caused by the elimination* of a grade crossing, *are all elements of the cost of eliminating* such crossings, which are to be apportioned under the provisions of the grade elimination code: *Coykendall v. Kingston*, 188 N. Y. S. 769, 115 Misc. Rep. 557.

The liability of a railroad for the statutory proportion of the cost in obviating a grade crossing also becomes the joint liability of several railroads, when passing under a single control: *Cincinnati v. Cincinnati Ry.*, 4 O. App. 443.

The words "all damages" include unliquidated as well as liquidated damages: *MacVeagh v. Wild*, 95 Fed. 84, 86; punitive as well as compensatory; *Jones v. Investment Co.*, 82 S. C. 456, 64 S. E. 225, 226; extra compensations: *Michigan Central Ry. v. State*, 148 Mich. 151, 111 N. W. 735-738; *Cousins v. Paxton*, 122 Iowa 465, 98 N. W. 277; except acts that are *damnum absque injuria: Tiller v. St. Louis Ry.*, 189 Fed. 999, 1000.

The words "cost and expense," or "entire expense," of constructing a viaduct in a grade elimination, include compensation for loss of ingress or egress: *Cincinnati Ry. v. Chattanooga,* 166 Tenn. 626, 64 S. W. (2) 196.

The fact that it will require an expenditure of $324,000 in the elimination of railroad grade crossings, which might be accomplished at an expense of $205,000, will not warrant interference by the court: *Lehigh Valley R. R. v. Utility Comrs.,* 278 U. S. 24, 73 L. Ed. 161, 62 A. L. R. 805.

III. The City had a provable claim under the Bankruptcy Act which should have been protected by the Reorganization court as provided by Section 77 (b).

As to the status of the claim in the reorganization court, the Bankruptcy Act 1938, Sec. 77 (b) (11 U. S. C. A., Sec. 205 (b)) provides:

> "The term 'creditors' shall include, for all purposes of this section, all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease. The term 'claims' include debts, whether liquidated or unliquidated, securities, liens, or other interest of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal Court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors."

It is clear that any claim provable in ordinary bankruptcy proceedings is provable in a railroad reorganization, Sec. 77 (4) 11 U. S. C. A., Sec. 205 (l). It is equally clear that the expression "claim of a creditor" in a railroad reorganization is a larger, more inclusive term than "creditor having a provable claim" under the general Bankruptcy Act: 10 *Remington Bankruptcy* (1939), Sec. 4173.

Sec. 57 (d) of Bankruptcy Act (1938) (11 U. S. C. A., sec. 93 (d)) provides:

> "Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or unless their consideration be continued for cause by the court upon its own motion. Provided, however, that an *unliquidated or contingent claim shall not be allowed unless liquidated or the amount* thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

Sec. 77 (b) of the Act (1938), sec. 205 (b) U. S. C. A., provides further:

> "In case an *executory contract* or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding under this section, or *shall* be rejected by any plan, any person injured by such nonadoption or rejection shall be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

It would seem that, under the definition of claims contained in Chapter 10, sec. 506 (1) 11 U. S. C. A., unliquidated claims are provable. They may be allowed when liquidated as directed by the court. The court may direct the liquidation of a claim by litigation in the state court. Such a direction is feasible where an action in the state court is requisite to determine the liability of an insurer of the debtor. 10 *Remington* (1939) p. 403, sec. 4552.

In *Maynard v. Elliot*, 283 U. S. 273, 75 L. Ed. 1028, the Supreme Court settled the controversial question as to the provability of a claim not due at the time of filing

the petition and held that the liability of a bankrupt indorser of commercial paper, not due at the time of filing the petition, is a provable claim under Sec. 63 (a-4) of the Bankruptcy Act; that under subsection (b) of that section "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

And so, tort claims are provable in equity receivership though they are not liquidated until after the petition is filed. See *Finletter on Bankruptcy Reorganization* (1939) p. 276 and cases therein cited.

Although a reorganization court has the exclusive right to determine the validity and amount of all claims against the estate, it may grant leave to a creditor to liquidate his cause of action in another proceedings if this course will not unduly delay the reorganization. A judgment in such proceeding will be recognized as exclusive as to the existence and amount of the claim, although enforcement of the rights of the creditor may be had only in accordance with the decrees of the reorganization court.

In *Forest v. Munson S. S. Lines* (1936) 299 U. S. 77 (reversing 82 Fed. (2) 289), refusal of the lower court to permit liquidation of a tort claim in the state court was held an abuse of discretion. In *Re Missouri Gas Co.* (W. D. Mo. 1935) 11 Fed. Supp. 434, liquidation of claim in suit begun in state court was permitted. In *Re Englander Spring Bed Co.* (E. D. N. Y. 1935) 117 Fed. Supp. 15, proceedings before the National Labor Relations Board were permitted to continue. See *Finletter on Bankruptcy Reorganization* (1939) p. 255.

There can be no question that the City had an unliquidated or contingent claim against the railroad under the statute and decree in the grade crossing elimination; and it is the contention of the City, since the liability of

the railroad is contingent upon the liability of the City, and that an action to determine such liability is now pending in the state courts, the only course for the reorganization court to follow was to stay the proceedings pending the outcome of the state litigation or else to avoid delay in the reorganization, to set aside, by a decree of court, a fund under the reorganization plan as will best safeguard the interest of the City as a creditor.

This view is supported by *Finletter on Bankruptcy Reorganization*, p. 276, citing *People v. Trust Co.*, 82 N. Y. 283, wherein it is stated, that if the exact amount of the claim can be calculated only within approximate limits, the court may order a fund to be set aside for the claim, to be applied when the amount becomes exactly determined.

IV. The court erred in refusing to approve the order submitted by the City approving Report of Special Master with modification that the claim of the City be disallowed but without prejudice to said City's right of recovery as it may otherwise in law or in equity be entitled.

The order submitted by the City which the District Court refused to approve is as follows:

> "It is Ordered that the exceptions of the claimant, City of Youngstown, to the report of Special Master William L. West, dated February 6, 1941, be and the same hereby are sustained insofar as said report purports to adjudicate against the City's basic right of recovery and recommends the total disallowance of the City's claim on that ground.
>
> This Court is of the opinion that the claim of the City of Youngstown is incapable of liquidation or reasonable estimation in these proceedings until the liability of the City to the Mahoning National Bank for the impairment of its mortgage security is first determined in the action pending in the state courts.
>
> It is therefore ordered that the report of the Special Master is hereby approved and confirmed, with the

> modification that the claim of the City be disallowed in these proceedings without prejudice to said City's right of recovery as it may otherwise in law or equity be entitled."

It is the contention of the City that such an order should have been entered in the circumstances, in the case of a contingent claim, without stamping the claim *res judicata*. It is warranted by Sec. 77, subsec. b, of the Bankruptcy Act and is in accordance with the decision of the U. S. Supreme Court in *United States v. Hamburg American Co.*, 239 U. S. 466, which requires "dismissal without prejudice," in order to protect the claimant in his future rights when and if they arise.

The tendency of Federal courts is against meddling with causes involving the determination of rights arising under state statutes or municipal ordinances, which can best be determined, and more properly so, in state courts. In the recent case of *Chicago v. Fieldrest Dairies* (1942), 86 Law. Ed. Advance Opinion, p. 88, Mr. Justice Douglas, on p. 890, said:

> "Here as in the *Pullman Co.* case (312 U. S. 496, 85 L. Ed. 971) a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. * * * In this case that discretion calls for a remission of the parties to the state courts which alone can give a definitive answer to the major questions posed. Plainly they constitute the more appropriate forum for the trial of those issues."

The principle was reaffirmed in *Brillhart v. Excess Ins. Co.*, decided by the U. S. Supreme Court June 1, 1942 and reported in *Law Edition Advance Opinions*, Vol. 86, No. 15, p. 1136. See also 54 *Harvard Law Review* 1379; 51 *Yale Law Journal* 511.

V. Only a moot or academic question being involved, the court was without jurisdiction to determine and adjudicate the claim on the merits.

The object of filing the City's claim was to assert the City's rights, under orders in these proceedings, in the event the liability of the City to the Bank received final determination while the re-organization proceedings were pending. The City's right to contribution by the Railroad, under statute and grade elimination decree, as to the "costs of improvement and all damages arising therefrom," hinges upon that contingency, when and if it arises. Liability *vel non* on the part of the Railroad cannot be determined until judgment for impairment of the mortgage security had first been recovered by the Bank against the City. Such action, still pending in the state courts and undetermined, the question is purely academic; and while the court may disallow the claim in these proceedings, as incapable of liquidation, it cannot adjudicate now against the City's future rights.

In 14 *Am. Jur.*, p. 277, sec. 49, it is stated:

> "The province of a court is to decide real controversies, not to discuss or give opinions on abstract propositions or moot questions. The duties and powers of courts are, therefore, limited to the determination of rights actually controverted in particular cases before them."

Likewise in 11 *O. Jur.*, p. 762, sec. 111:

> "The function of the court is to render judgment in actual controversies between adverse litigants, to command or restrain specific acts affecting existing rights of parties before the court, as distinguished from declaratory judgments affecting *possible rights and potential controversies.* A court will not, as a general rule, pass upon moot questions."

In *Ashmander v. Tennessee Valley Authority*, 297 U. S. 288, at p. 324, Chief Justice Hughes stated:

> "The judicial power does not extend to the determination of abstract questions. * * * Claims based merely upon assumed *potential invasions* of rights are not enough to warrant judicial intervention."

In *Barker Painting Co. v. Brotherhood of Painters,* 281 U. S. 462, Justice Holmes said:

> "It (the court) cannot be required to go into general propositions or prophetic statements of how it is likely to act upon other possible or even probable issues that have not yet arisen."

And so in *Old Colony Trust Co. v. Commissioners of Internal Revenue,* 279 U. S. 716, the Supreme Court would not undertake to adjudicate the validity of a tax before an attempt has been made to impose it. See also *Helvering v. Griffiths,* decided March 1, 1943 and reported in advance opinions *Law Edition,* Vol. 87, p. 597.

In *United States v. Hamburg American Co.,* 239 U. S. 466, it was held that where a case to dissolve a combination under the Anti-Trust Act has become moot and this Court has thus been prevented from deciding it upon the merits, and the court below decided against the government, the course most consonant with justice is to reverse, with directions to dismiss the bill without prejudice to the government in the future to assail any actual contract or combination deemed to offend the Anti-Trust Act. To the same effect is *Standard Oil Co. v. United States,* 283 U. S. 163.

It is needless to point out to the Court that the City and the Railroad stand equally before the law and that the City is entitled to its day in court for the purpose of determining its right to contribution by the Railroad, under statute and grade elimination decree, of any damages that the City may be called upon to respond in connection with the grade crossing elimination, when and if that contingency arises.

As stated by Justice Holmes in *Erie Railroad v. Ut. Commissioners,* 254 U. S. 394, where the railroad was represented by former Chief Justice Hughes, that as between the two conflicting interests in cases of grade crossings elimination—that of the public using the streets and that of the Railroad—the former is paramount, notwithstanding the execution of the plan will involve expenditures so heavy as to impair the efficiency of the Railroad or even lead it to bankruptcy.

The order, as submitted by the City, is just and equitable to all parties and warranted by the Bankruptcy Act. It should have been entered. Or, in the alternative, as requested by the City, a fund should have been set aside under the reorganization plan to safeguard the City's rights as a creditor. We ask that the judgments of the Circuit Court of Appeals and of the District Court be reversed.

Respectfully submitted,

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